***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

To be argued by
George W. F. Cook

Docket No. 75-1352

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

DONALD RICHARD BRANT

Appellant

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Appeal from the United States District Court for the District of Vermont

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# BRIEF FOR THE UNITED STATES

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GEORGE W. F. COOK
United States Attorney
District of Vermont



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# BRIEF FOR THE UNITED STATES

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## STATEMENT OF THE CASE

Donald Richard Brant appeals from a judgment of conviction entered on May 28, 1975, after a six day trial before the Honorable Albert W. Coffrin, United

States District Judge for the District of Vermont, and a jury.

An indictment, bearing Criminal No. 75-16, and filed February 3, 1975, charged defendant Donald Richard Brant and co-defendant Kevin Richard Dailey in two counts as follows:

Count I charged that between December 1, 1973 and April 11, 1974, in the District of Vermont, and elsewhere, the defendants, Brant and Dailey, and co-conspirator James E. Gardner, unlawfully conspired to commit an armed bank robbery of money in the care and custody of employees of the Chittenden Trust Company at its branch office in South Burlington, Vermont by force and violence through the use of loaded firearms, and that several overt acts, including the actual armed robbery, were committed at the bank by Brant, Dailey and Gardner on April 11, 1974, in violation of 18 U.S.C. §371.

Count II charged that on April 11, 1974, in the District of Vermont, defendants Brant and Dailey, did take by force and violence from the person and presence of Mark Ashley and Richard Goss, bank employees, the sum of $4350.00 belonging to Chittenden Trust Company of Burlington, Vermont, at the branch office of said bank on

the Shelburne Road in South Burlington, Vermont, the deposits of which are insured by the F.D.I.C., and in committing said robbery, the lives of said employees were put in jeopardy by the use of dangerous weapons; in violation of 18 U.S.C. §§2, 2113(a) and 2113(d).

The trial of Donald Richard Brant* began on May 20, 1975 and terminated on May 28, 1975 when the jury returned a verdict of guilty against Brant on both counts.

On September 22, 1975, Brant was sentenced to serve three years on the conspiracy count, and twenty years on the substantive count (Count II), Count II to run consecutive to Count I.

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* On May 19, 1975, the day before trial commenced, co-defendant Dailey pleaded guilty to the count of conspiracy. The bank robbery count against Dailey was dismissed following his sentencing on the conspiracy count.

## STATEMENT OF FACTS

Taking the evidence in a light most favorable to the Government (and largely from the testimony of accomplice James Gardner) the facts are as follows:

During the period from October, 1973 until April, 1974, defendant Donald Richard Brant resided in a rented home on Linden Terrace in Burlington, Vermont (Tr. 180)(Tr. 465) with his common-law wife, Denise Chasteen (Tr. 180) under the name of Mr. and Mrs. Charles Rogers. (Tr. 466) While so residing there, defendant Brant used other aliases and rented apartments in the Burlington area under these aliases, including the use of the name of Frank Sherman at an apartment which Brant rented at 45 Manhattan Drive (Tr. 576), and the name of Robert Nelson at 55 Monroe Street. (Tr. 462) During this period of time, Brant also had motor vehicles registered in the State of Vermont under aliases (Tr. 448-457), including a 1962 light tan Mercedes Benz automobile (Tr. 206) which Brant had purchased from witness Chris Pond of Burlington on November 11, 1973, Brant using alias Robert Nelson in making this purchase. (Tr. 433)

The Government's major witness, and alleged co-conspirator, James Gardner, had known defendant Brant

since 1961. (Tr. 175) Gardner and Brant had been in close association on numerous occasions since 1961. (Tr. 176) In October, 1973 to April, 1974, Gardner lived at 129 Pearl Street, Manchester, New Hampshire, as well as in Nashua, New Hampshire and Cambridge, Massachusetts. (Tr. 181, 182) During this period of time in late 1973 and the spring of 1974, Gardner made many trips to see Brant at the Linden Street address in Burlington, Vermont. (Tr. 182)

In October, 1973, a mutual friend of both Brant and Gardner, one Freddie Bishop, leased a camp just outside of Burlington, in Grand Isle, Vermont (Tr. 570) using the name "Daniel McKenna". The lease to the camp was negotiated by Bishop using the name "McKenna", and Brant's common-law wife, Denise Chasteen, who used the name "Sandra McKenna". (Tr. 570, 571) On Gardner's visits in Burlington during October and November, 1973, Brant, Bishop and Gardner entered into plans to commit an armed robbery at the Shelburne Branch Bank of the Chittenden Trust Company. (Tr. 183, 185) The idea to rob the bank was Brant's. (Tr. 183) Brant thought the robbery would be an easy one. (Tr. 183) Brant had scouted the bank, and had watched a single courier make deliveries of money at the branch bank. (Tr. 183) Based on the number of bags

delivered, Brant said he thought that between $100,000 and $200,000 could be netted. (Tr. 184)

At some time during 1973, Gardner transported from his home in Manchester, New Hampshire to the Linden Terrace home in Burlington, an assortment of accessories to be used in the contemplated bank robbery, including several guns, face masks, and possibly hats (Tr. 196, 282, 283) and jackets. (Tr. 284) During the planning stage, a William Brady from the Massachusetts area became associated with Brant, Bishop and Gardner and agreed to go in on the prospective robbery. (Tr. 280)

On December 3, 1973, Bishop was arrested on a homicide charge in Rhode Island, and was thereafter continuously incarcerated in Rhode Island. (Tr. 316, 325) Hence, Bishop dropped out as a possible participant in the planned robbery. (Tr. 202) Just before Christmas in 1973, on a Thursday, Gardner and Brady drove from the Boston, or Manchester, New Hampshire area to Brant's Linden Terrace residence in Burlington (Tr. 188) for the purpose of committing the planned bank robbery with Brant on the following day. (Tr. 188, 189)

Early the next morning (December 20, 1973), Brady and Gardner stole a 1971 Ford LTD in the General Electric

Company parking lot in Burlington, Vermont, with Brant operating as a lookout. (Tr. 191, 192) A dent puller was used to remove the ignition and start the car. (Tr. 191) After stealing the 1971 Ford, Brant drove his own car from the lot, with Gardner and Brady following in the stolen Ford. (Tr. 193) A short distance from the Chittenden Trust Company branch bank, Brant parked his car and switched a bag of paraphenalia, including guns, masks, jackets and hats, to the stolen car. (Tr. 197) The three then proceeded to the Shelburne Road branch bank of the Chittenden Trust Company with the intention of committing the planned armed robbery. (Tr. 198, 199) Shortly thereafter, on December 20, 1973, Brant, Brady and Gardner donned these disguises and then drove into the parking lot of the bank, and waited for the money courier to arrive. (Tr. 199)*

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*Gardner initially testified that Bishop joined Brady, Brant and Gardner in the December 20, 1973 trip to the bank, and that Bishop actually participated in an aborted robbery on December 20, 1973. (Tr. 196-200) However, following testimony from defendant's witness Goulding, that Bishop was continuously incarcerated after December 3, 1973 following his arrest on a homicide charge in Rhode Island, Gardner grudgingly admitted that he could be wrong about Bishop being present on the December 20th attempted robbery. (Tr. 364-366), and it was possible that Bishop was not along on the December 20th attempt. (Tr. 366) It seems clear that the jury accepted Gardner's explanation or discounted the value of this particular testimony.

Sometime after 9:00 A.M., the courier or messenger drove up to the bank, but in a different car than his usual Mercury Brougham, and he was accompanied by another man. (Tr. 200) On previous occasions, Brant had scouted the operation and had observed only the lone driver. (Tr. 200) There was discussion in the car because of the additional man in the messenger car. (Tr. 200, 201) Brady particularly objected, and because of this objection, it was decided to pass up the robbery. (Tr. 201) After dropping the stolen car off "at the college", the three returned to Brant's apartment on Linden Terrace. (Tr. 202) Brant still wanted to do the robbery (Tr. 202) and Gardner and Brant still continued to plan the robbery, following the aborted attempt on December 20, 1973. (Tr. 200) Brady dropped out of the group, and Bishop could not participate because of his incarceration in Rhode Islant. (Tr. 202, 317, 323) Brady, however, put Gardner in touch with co-defendant Kevin R. Dailey of Marshfield, Massachusetts recommending Dailey as a possible substitute for Brady in the planned bank job. (Tr. 203, 204)

Around the middle of March, 1974, Gardner drove Kevin R. Dailey from the Boston area to Brant's home on Linden Terrace in Burlington, Vermont for the purpose of

discussing the prospective bank robbery. (Tr. 204, 205) While at Brant's house, the three, Gardner, Dailey and Brant, briefly discussed the prospective bank robbery. (Tr. 205, 206) However, the major discussion was between Dailey and Brant regarding Dailey's purchase of Brant's yellow or tan 1962 Mercedes Benz. (Tr. 205, 206) The sale was actually transacted (Tr. 206, 207), Brant gave Dailey a bill of sale and transferred the registration to Dailey. (Tr. 207) Dailey took possession of the Mercedes Benz and drove it back to the Boston area the next day where Dailey registered it with the Massachusetts Motor Vehicle Department (Tr. 441-448), indicating that Dailey had purchased the Mercedes Benz from Robert L. Nelson of 55 Monroe Street, "Burlington, Massachusetts". (Tr. 440) Dailey followed Gardner back to Boston the next day, Dailey using Brant's Vermont plates on the Mercedes. (Tr. 208)

Around the end of March, 1974, Dailey and Gardner again drove up from the Boston area and visited Brant in Burlington at the Linden Terrace home. (Tr. 210) On this second visit by Dailey, plans for the bank robbery were fully discussed (Tr. 210), and on this occasion, Dailey firmly committed himself to participate in the prospective bank robbery along with Brant and Gardner.

(Tr. 211) On this occasion, Brant showed Dailey the "situation" at the branch bank. (Tr. 211) While in Burlington on this occasion, Dailey and Gardner ate at the Chinese Restaurant on the Shelburne Road where Brant and Gardner had eaten on several previous occasions, and which was located a short distance from the bank. (Tr. 294, 431) The three also decided that they would pull the robbery on April 11, 1974. (Tr. 212) The following day, (in late March, 1974) Dailey and Gardner returned to the Boston area. (Tr. 212)

On April 10, 1974, Gardner and Dailey again drove from Boston up to Brant's apartment in Burlington, arriving at about 8:00 P.M. (Tr. 212) After arriving in Burlington, Gardner and Dailey again ate at the Chinese Restaurant on the Shelburne Road (Tr. 213), and Brant joined them there after dinner. (Tr. 213) Later that night, at Brant's place, Dailey selected his equipment for the bank robbery the next day, including a .45 automatic, a blue blazer jacket, and a baseball cap. (Tr. 214)

The next morning, April 11, 1974, Brant, Dailey and Gardner arose at about 7:00-7:30 A.M. and prepared to go on the bank robbery. (Tr. 216) All of the equipment for use in the bank robbery was placed in

one duffle bag. (Tr. 216) For weapons, Brant took a loaded sawed-off shotgun, Dailey the loaded .45 handgun, and Gardner a .38 pistol. (Tr. 215, 216) The three then proceeded to place the duffle bag of equipment in Brant's car and Brant drove the three to the same General Electric Company parking lot where the 1971 Ford had been stolen on December 20, 1973. (Tr. 217) While at the lot, Gardner and Dailey broke into and stole a 1973 new Ford LTD, using a dent puller to remove the ignition, and a screwdriver in place of a key. (Tr. 218) (This same procedure had been followed in December).

After Dailey and Gardner started the stolen 1973 Ford LTD, Gardner drove it following Brant, who was driving his own car, to a point near the bank where Brant's car was parked, and Brant got into the stolen Ford, bringing the duffle bag with him. (Tr. 219) After stopping to put their jackets on, the three, Brant, Dailey and Gardner drove the stolen car to the parking lot in which the branch bank was located, arriving there at 9:00 A.M. on April 11, 1974. (Tr. 220)

Gardner parked the car where they had an unobstructed view of the branch bank. (Tr. 221) Some 15 minutes later, at about 9:15 A.M. on April 11, 1974,

the bank messenger, Arthur Goss, drove up in the blue Mercury automobile, as was his custom. (Tr. 222) Mark Ashley, the Assistant Manager, came outside the bank, got a shopping cart from the Grandway store next door, and proceeded to help the messenger unload bags of coin from the Mercury. (Tr. 44) Shortly thereafter, Gardner drove the 1973 Ford LTD up behind the Mercury, and Brant, Dailey and Gardner jumped out of their car wearing plastic masks, baseball caps and blue jackets, and pointed their loaded guns at Goss and Ashley, and Dailey proceeded to remove the money bags from the cart and trunk of the Mercury and load them into the Ford LTD. (Tr. 223) Brant used a loaded shotgun (Govt. Ex. 16) (Tr. 224), holding it on Goss. (Tr. 500) The robbery was observed by two employees within the bank, Linda Godin and Kathy Sheridan, and from persons occupying cars in the parking lot, witness Doris Martin and her husband (Tr. 98) who recorded the license number VT N-7218 on the stolen 1973 Ford LTD, and witnesses Carroll and Gail Ambrose. (Tr. 141, 627) Brant tried to get into the bank, but the door was locked. (Tr. 224) Brant also removed one money bag from the Mercury. (Tr. 225) After about 45 seconds had elapsed, Brant called "time" or

"let's go", and ordered Goss and Ashley to lie down in front of the bank, and the three took off in the Ford LTD (Tr. 226), and a few minutes later, dropped the stolen car off near the place where Brant had earlier parked his own car, and the three, Dailey, Brant and Gardner then returned to Brant's home on Linden Terrace in Brant's car. (Tr. 228) Left behind in the stolen Ford LTD were several bags of coin taken from the bank employees. (Tr. 158) The total amount of money taken was $4350. (Tr. 31) Some $1350 in coin was left in the abandoned stolen Ford LTD. (Tr. 158) Brant, Dailey and Gardner then proceeded to Linden Terrace where a bag containing $3000 in small currency was distributed, each of the three participants receiving $1000. (Tr. 234) Dailey, Brant and Gardner remained at Brant's home the entire day of April 11, 1974, and returned to the Boston area on April 12, 1974. (Tr. 235)

The foregoing account is largely the testimony of James Gardner, 36 years of age, and an indicted co-conspirator, admitted accomplice, and a convicted felon who was then serving time for bank robbery and homicide. (Tr. 174-176) However, many of the circumstances surrounding the planning of the robbery, and the robbery

itself, were verified by independent witnesses.*

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*Specifically, Brant, Bishop and Gardner were shown to have been associated with each other in New Hampshire (Witness Boisvert, Tr. 474-479 and Witness Romillard); Dailey was shown to have purchased the Mercedes Benz from Brant, using the name Robert Nelson (Witness Maggoli, Tr. 441-447 and Wtiness Pond, Tr. 432-441); Bishop was shown to have resided in the Burlington area during October and November, 1973 in a camp which he rented with Brant's common-law wife, Denise Chasteen, under the aliases Daniel and Sandra McKenna (Witness Overton, Tr. 571); Brant was shown to have used the following aliases in the Burlington area: Charles Rogers at Linden Terrace (Witness Heon, Tr. 466), Frank Sherman at 45 Manhattan Drive (Witness Race, Tr. 576), and Robert Nelson at 55 Monroe Street (Witness LaValley, Tr. 460); Brant was further shown to have resided with Denise Chasteen and a Husky dog while at the Linden Terrace address, and that Chasteen and the dog accompanied Brant on his earlier visits to see Gardner in New Hampshire; Tr. 161); Brant was further shown to have been present in the Chittenden Trust Company drive-in bank under circumstances which would indicate that he was scouting the bank since he had no account there either under his own name or several aliases (Witness Godin, Tr. 132, 133 and Witness Sheridan, Tr. 136-138 and Witness Fletcher, Tr. 524); the 1973 Ford LTD was stolen in the manner described by Gardner (Witness Beaupre, Tr. 91-98 and Witness Curran, Tr. 151); the equipment used by the three robbers, including each weapon (the automatic sawed-off shotgun, the .45 caliber handgun and the .38 pistol), as testified to by Gardner, was largely corroborated by the testimony of seven eye witnesses, that is, Witness Goss, Tr. 20; Witness Ashley, Tr. 41; Witness Doris Martin, Tr. 98; Witness Carroll Ambrose, Tr. 141; Witness Godin, Tr. 76; Witness Sheridan, Tr. 81 and Witness Gail Ambrose, Tr. 632. All of the eye witnesses gave testimony regarding the physical appearances of the three masked robbers, and all such testimony

In light of the criminal record of witness James Gardner, and of the promises which he had received from the Government in return for his cooperation, the Government chose to introduce evidence of a prior similar act to prove Brant's identity through a common modus operandi or scheme involving the prior similar act, and the act charged. The Government also offered the prior similar act to bolster the credibility of Gardner since the incriminating facts surrounding the prior similar acts

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Footnote continued -

was consistent with the appearance of Brant, Dailey and Gardner, No witness would say that the size of Brant, Dailey and Gardner was inconsistent with their observations.

Lastly, the automatic single barrel sawed-off shotgun (Government's Ex. 16), which Gardner had testified was used by Brant, and the .45 automatic handgun (Government's Ex. 15), which Gardner testified was used by Dailey, were identified by Witness Goss has having individual characteristics similar to those he observed being used by the robbers. (Tr. 497-507) Further, this particular sawed-off shotgun was specifically linked to Brant, as it was recovered from a green Tempest automobile owned by Brant, (Government's Ex. 10, Tr. 392-412) on June 13, 1974. (Tr. 393) The recovery of this sawed-off shotgun, (Government's Ex. 16) was made pursuant to a search warrant issued by a magistrate in the Western District of New York. (Tr. 396)(Tr. 411) Further, the .45 automatic handgun (Government's Ex. 15) was further linked to Brant as it was recovered from Brant's Pontiac automobile during the same search. (Tr. 411)

were largely supported by testimony other than Gardner's. After an offer of proof at the bench, and on the basis of the Government's memorandum of law (Document 17) and offer of proof (Tr. 109), and on the basis of United States v. Johnson, 382 F.2d 280 (2d Cir. 1967), the Government was permitted to introduce proof of a prior similar act.

Following this ruling, James Gardner testified substantially as follows: During September and October of 1973, Gardner lived at 129 Pearl Street in Manchester, New Hampshire. (Tr. 237) During that time, Brant, on several occasions, visited Gardner at the 129 Pearl Street apartment in Manchester, New Hampshire. (Tr. 237) Brant drove a green Pontiac automobile with Maine license plates attached and was usually accompanied by his common-law wife, Denise Chasteen, and a dog described as a Husky. (Tr. 239) Brant was using the name of Frank Sherman while in Maine and during his visits to New Hampshire (Tr. 238), which was the same name that Brant later used in Burlington at the apartment which he rented at 45 Manhattan Drive between November 15, 1973 and April, 1974. (Tr. 238) During this period, Freddie Bishop had been staying with Gardner, and Brady had also stayed with Gardner. (Tr. 242)

On the morning of October 4, 1973, at about 8:30 A.M., Brant picked up Gardner, Bishop and Brady outside of the 129 Pearl Street address (Tr. 242), Gardner carried guns wrapped in a blue blanket from his house to Brant's car where Brant directed Gardner to put them in the trunk, and the four went off to steal a car. (Tr. 243) A 1970 Ford LTD was stolen by pulling the ignition with a dent puller. (Tr. 527) Thereafter, a duffle bag containing firearms and other equipment was transferred to the stolen Ford and the four, Brant, Bishop, Brady and Gardner, proceeded to the main office of the Bank of New Hampshire at 300 Franklin Street, Manchester, New Hampshire. (Tr. 508, 509) The four arrived at the bank at about 10:20 A.M. on October 4, 1973. (Tr. 509) All four robbers were wearing blue parkas, baseball caps and masks similar to those used in the subsequent Chittenden Trust Company robbery. (Tr. 244) Brant carried the automatic shotgun, Gardner carried a .38 handgun, and Brady and Bishop were also armed. (Tr. 244) After entering the Bank of New Hampshire, Brant stood in the lobby and covered the door and people with his automatic sawed-off shotgun while the other three went over the counter and gathered up money. (Tr. 245) After about 45 seconds or more had transpired,

Brant hollered "let's go" or "time" and all four left the bank. (Tr. 245) Thereafter, the stolen car was ditched, the money was split up, and the firearms were returned to Gardner's apartment at 129 Pearl Street for storage. (Tr. 248)

In contrast to the Vermont robbery, Gardner's neighbor who lived at 131 Pearl Street, Yvette Boisvert, placed Gardner, Brant and two other men together just minutes before the Bank of New Hampshire robbery on October 4, 1973. (Tr. 476-480) Specifically, Mrs. Boisvert testified that she knew Brant as a person by the name of Frank who visited Gardner (who used the name Roger Roy) at 129 Pearl Street during 1973, and that a girl "and a Husky dog accompanied Frank"(Brant). (Tr. 475) On the morning of October 4, 1973, a short time before news of a bank robbery at the Bank of New Hampshire came over the radio, Mrs. Boisvert saw Gardner carry objects wrapped in a blue blanket from his apartment at 129 Pearl Street and meet Frank (Brant), who was standing beside his car. (Tr. 477) Mrs. Boisvert saw Gardner go over to Brant, put the blanket full of objects into the trunk of Brant's car, and then drive off with Brant and others. (Tr. 477) Witness Romillard, who lived at 127 Pearl

Street, also testified that he knew Bishop, and that Bishop had stayed at 129 Pearl Street during the fall of 1973. (Tr. 494) Lastly, Bank Vice President Arthur Yuill testified that transparent masks similar to Government's Ex. 2 were used, that baseball hats similar to Government's Ex. 3 were used, and that the robber in the lobby used a sawed-off shotgun similar to Government's Ex. 16. Government's Ex. 2 and 3 were found in the stolen 1973 Ford LTD allegedly used in the Vermont bank robbery. (Tr. 155) Mr. Yuill further testified that the robber who occupied the lobby position and who seemed to be the head of the gang, pointed the sawed-off shotgun at Yuill. (Tr. 512) After examining Government's Ex. 16, the sawed-off shotgun, Yuill was asked if it looked familiar and he stated: "Well, the man that was in the middle of the lobby held a gun similar to that. I can't say that is the gun that he had but it was similar to that. I was very conscious of the fact it had no barrel like a regular shotgun, and I was also very conscious of the fact that the chrome piece there identified it to me as a shotgun." (Tr. 514) Yuill further was conscious of the over all length of the gun which looked the same, and also of the ribbing on top of the gun. (Tr. 514)

At the trial in Vermont, messenger Goss also testified that the automatic shotgun, Government's Ex. 16, looked "exactly like the one used in the holdup on April 11." (Tr. 499) Goss said he was only two feet from the barrel while observing it, and particularly noticed the chamber for the extra shells, and the sighting bead on top. (Tr. 501) Goss also noticed that the end of the barrel and the pump action "were very close together." (Tr. 501)

Lastly, witness Schoepf, a Bank of New Hampshire teller, testified that Government's Ex. 2 looked "very much" like the mask worn by one of the robbers on October 4, 1973. (Tr. 521) In further testimony regarding the similarity of Government's Ex. 2, Schoepf said: "I definitely recall (it) being fixed to the head with an elastic band in the back. I recall that definitely, and I do remember the highlighting on the eyebrows and as far as the type of plastic, that is the same." (Tr. 521) Schoepf also heard the man in the lobby yell "time" after the robbery neared completion. (Tr. 522) Lastly, FBI Agent Riley testified that during the past five years, he had investigated many bank robberies as a member of the Boston bank robbery squad and had seen many sawed-off

shotguns, but had never seen an automatic single barrel sawed-off shotgun. (Tr. 536)

The testimony regarding the prior similar act in New Hampshire largely concluded the Government case. The jury returned a verdict convicting defendant Brant on both the conspiracy count and the substantive count of bank robbery.

Facts Relating to Newspaper Publicity

During the trial, the Court took a recess from 4:30 P.M. on Friday, May 23, 1975 to 9:30 A.M. on Tuesday, May 27, 1974. On resuming the trial on May 27, 1975, defendant's counsel moved the Court to have the jury polled to determine whether the jurors had knowledge of an attempted jail break by defendant Brant. (Tr. 556) While Government counsel were not familiar with the publicity referred to, the Court stated that it was familiar with a newspaper account which stated that on Sunday evening (May 25th), Mr. Brant overpowered a guard and attempted to leave the Burlington Correctional Center and was apprehended a block from the Correctional Center by Burlington Police, and returned to the Center. (Tr. 557)

The Court thereupon asked the defense counsel's further view, which was that an inquiry of the jurors

might produce a basis for mistrial due to the prejudicial effect of the news. (Tr. 557) The Government was then asked to respond. The Government took the position that no mistrial should be granted in any event, since any harm to the defendant was generated solely by his own action. (Tr. 558) Further, in view of the Government's position that a mistrial should not be granted in any event, the Government went on to suggest that if any juror was aware of the publicity, further harm would necessarily result from a concentrated inquiry on the matter. (Tr. 550)

Thereafter, the Court denied defendant's motion for the reason that the publicity stemmed from events initiated by the defendant. (Tr. 559) The Court declined to poll the jury. (Tr. 560) The jury was generally cautioned at the close of each days evidence not to listen to any discussions of the case, or read anything about it.

On the morning of May 28, 1975, the day on which the case was given to the jury, the thirteenth paragraph of a newspaper account on Page 19 of the Burlington Free Press was as follows:

> Brant has been indicted on charges of murdering two persons whose bodies were found in a swamp in Ledyard, Conn., according to the Associated Press. He attempted to escape from the Burlington Community Correctional Center Sunday night after overpowering a guard and taking his keys. After several minutes of liberty, however, he was recaptured by police at College Street and South Winooski Avenue. (A. 8)

This article was not brought to the attention of the Court during the course of the trial. Any issue regarding prejudice to the defendant from the publication of this article was first raised in Brant's motion for a new trial (Document 33), filed several days after the guilty verdict on May 28, 1975.

## ARGUMENT

POINT I

PROOF OF BRANT'S PARTICIPATION IN A BANK ROBBERY IN NEW HAMPSHIRE SOME SIX MONTHS PRIOR TO THE DATE OF THE BANK ROBBERY CHARGED IN THE INDICTMENT WAS PROPERLY ADMITTED AS A PRIOR SIMILAR ACT TENDING TO PROVE IDENTITY BY MEANS OF A COMMON MODUS OPERANDI OR SCHEME.

As noted in the statement of facts, on the opening day of trial, the Government first brought to the attention of the Court and defense counsel the fact that as part of the Government's proof, the Government would introduce evidence of a prior similar act involving Brant's participation in a New Hampshire bank robbery occurring some six months prior to the Vermont bank robbery. During the noon recess on the first day of trial, May 20, 1975, following the empaneling of the jury, the Government filed its "Memorandum of Law in Support of Admissibility of Prior Similar Acts" (Record, Document 17) with the Court and defense counsel. (Tr. 106, 123, 129)

Government's Memorandum (Record, Document 17) states in part, as follows:

> The primary evidence against the defendant Donald Richard Brant with respect to the bank robbery charges contained in the indictment is the testimony of co-conspirator and accomplice James Gardner. The Government anticipates that Brant's defense will attempt to impeach the credibility of Gardner in an effort to persuade the jury that Gardner is unworthy of belief with respect to his testimony that Brant was involved in such a crime. In this regard, the Government intends to offer proof that approximately six months earlier defendant Brant, James Gardner, and two other persons who were originally scheduled in the Vermont planned robbery but who withdrew in favor of Kevin Dailey, planned and executed a nearly identical bank robbery in New Hampshire. This proof will demonstrate that the modus operandi, the techniques, the equipment and the persons involved were virtually identical with the Vermont bank robbery. In addition, James Gardner's testimony with respect to the New Hampshire bank robbery will be corroborated in numerous important details, thus permitting the jury to infer that he is telling the truth not only with respect to the New Hampshire bank robbery, but also with respect to the Vermont bank robbery. Consequently, the evidence of the New Hampshire bank robbery is crucial to the Government's case in that it properly bolsters Gardner's testimony with respect to the Vermont transaction which is the subject of the charges on trial.

The Court took up the matter cited in the Government's memorandum at the conclusion of the first day of trial. (Tr. 106) Defense counsel acknowledged that he had received a copy of the memorandum, but had not yet

read it. (Tr. 106) The Court asked defense counsel to read it, and to file any reply memorandum the following morning. (Tr. 106)

At 9:30 A.M. the following morning, May 21, 1975, defense counsel filed a reply memorandum of law (Record, Document 19) and both sides were heard regarding the Government's offer of prior similar act evidence. (Tr. 109-119) The Government was asked to make an offer of proof, which offer of proof generally followed the actual proof, as stated in the foregoing statement of facts.*

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*MR. COOK. I can do that, generally, your Honor. The proof of the New Hampshire transaction would be that this was another bank robbery which preceeded the bank robbery in Vermont by just about six months. Mr. Gardner, under the name of Roger Roy, was living in Manchester, New Hampshire at the time, and when I say "at the time," the time this would be in September and October of 1973--in that area-- and Mr. Brant visited rather regularly there. Mr. Brant drove a car with Maine registration plates on it, and Mr. Gardner, at the Manchester, New Hampshire residence by independent witnesses, or, at least, a witness, and I think there were probably others, Mr. Brant under the name, I believe, "Frank Sherman" was seen to visit Roger Roy, who would be Mr. Gardner on the morning of the bank robbery in New Hampshire on October 4, 1973.

Mr. Brant was seen to be down in his car--I can't remember the make of the car--on the outside of Roger Roy's residence, just across the street some forty or fifty feet away from Gardner's residence, which was also an apartment

The Court thereupon noted that the Government's offer of proof "pretty much follows along with the Johnson tradition" (referring to the Second Circuit case of United

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Footnote continued -

house area shared; the other apartments were filled. The independent witness there will state she observed Brant to stand outside his car. There was another person, at least another person in the front seat of the car, and that Gardner, under the name of "Roger Roy" left his apartment. He had a bundle, a large bundle which he was carrying, wrapped up in a green or blue blanket; that he took it over to Brant's car just across the street only a very few feet away, and that Brant directed--this is by independent evidence--to put it in the back of Brant's car.

* * *

MR. COOK. Then the car left. I think there may be a slight dispute as to how the car left. There may be a slight variance as to that evidence, but the car left and the witness noticed that the bank robbery occurred--this is roughly 9:30 in the morning--and it came over the radio. She was working in her kitchen at the same time as the bank had been robbed, and, of course, witness Gardner will testify he and Brant and a person by the name of Bishop and Brady, will testify about the switching of cars which is very usual and similar to the switching transactions that occurred in Vermont, and he will also testify about the details that Brant and Bishop and Brady and himself went through at the branch New Hampshire bank at that time on October 4th, and the way that bank robbery was performed is really the same M.O. Brant is the same "take charge guy". He would be similarly identified; he would be absolutely identified by Gardner, but he will be identified by independent witnesses as being the "take charge Guy" with the Very same gun, sawed-off shotgun, giving directions. He kept time in both cases, and he gave the time signals, and

States v. Johnson, 382 F.2d 280 (2d Cir. 1967) and ruled that the Government would be permitted to introduce evidence

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Footnote continued -

the fact some of them are the same, and I think that would be corroborated; I believe it would be in New Hampshire. Certainly, it would be Gardner's testimony.

THE COURT. What do you mean "New Hampshire"? I don't know I follow you there.

MR. COOK. Well, I think--I can't--I think we will have two witnesses from the bank who will testify that a person resembling Brant had the sawed-off shotgun, was giving the orders in the lobby, and that will be the same type of crime, the same M.O. which occurred, according to Gardner's testimony, down at the Chittenden Trust Company, and I am sure there are a few other matters that were performed quite similarly, and we think the inference the jury would draw through witnesses from New Hampshire, who definitely pin Gardner and Brant together just before the robbery, that the similarity of the acts over there is probative of the fact that the same people committed the acts in Vermont. We offer that as affirmative proof, as well as proof of Gardner's credibility.

regarding Brant's prior similar act in New Hampshire on October 4, 1972. (Tr. 119)

As indicated to the Court when it filed its memorandum on May 21, 1975, it is the Government's position that the New Hampshire prior similar act testimony was properly admissible under the inclusory rule followed by the Second Circuit Court of Appeals, particularly in United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967); United States v. Papadakis, 510 F.2d 287, 294-95 (2d Cir.), cert. denied, 95 S. Ct. 1682 (1975); United States v. Johnson, 382 F.2d 280 (2d Cir. 1967) and United States v. Bozza, 365 F.2d 206, 212 (2d Cir. 1966) to show a common modus Operandi to prove identity but also on the issue of intent.

The Court in Deaton restated the general rule followed in the Second Circuit that "evidence of similar acts, including other crimes, is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition." Id. at 117. (Some fifteen Second Circuit cases are cited therein in support of this rule. Id. at 117) The Court in Deaton went on to state:

> The majority of courts express their other crimes rule in an exclusory form, that is, evidence of other crimes is not admissible except for a host of purposes. . . . Because the exceptions are so numerous it is difficult to determine whether the doctrine or the acknowledged exceptions are the more extensive. Fairbanks v. United States, 96 U.S. App. D.C. 345, 346, 226 F.2d 251, 253 (1955). A minority of courts has adopted the inclusory form of the rule, that is, that evidence of other crimes is admissible except when offered solely to prove criminal character. This form is favored by the commentators and has been recognized and used by this court. 70 Yale L.J. 763, 767 (1961); Wigmore, Evidence (3rd ed. 1940) See 216. Admissibility of Evidence of Crimes not Charged in the Indictment, 31 Oregon L. Rev. 267 (1952). This is largely a matter of approach or emphasis, although the latter would result in a somewhat "broader range of admissibility." Spencer v. State of Texas, supra, 385 U.S. at 561, n.7, 87 S. Ct. at 652. Which ever method is adopted, the trial judge is required, as with any potentially prejudicial evidence, to balance all of the relevant factors to determine whether the probative value of the evidence of other crimes is outweighed by its prejudicial character. Id. at 117.

The Government offered the New Hampshire prior similar act on the issue of identity (Tr. 112), and on the issue of criminal intent (Tr. 117) as permitted in United States v. Johnson, 382 F.2d 280, supra.

While there are many Second Circuit cases permitting proof of prior similar acts to prove intent, there

are no known Second Circuit cases dealing specifically with the precise issue of the admissibility of prior similar acts to prove identity by showing a common modus operandi. However, the principle of admissibility is equally applicable, whether the issue be intent, or identity. (See 2 J. Wigmore, Evidence §411 (1940)). A Federal case dealing with this principle of identity is Payne v. United States*, 294 F.2d 723 (1961 D.C. Cir.). There, the District of Columbia Court of Appeals quoted favorably from the Supreme Court of Ohio in Whiteman v. State, 119 Ohio St. 285, 164. N.E. 51, 63 and stated as follows:

> . . .the opinion of the Ohic Supreme Court in Whiteman v. State, 1928, 119 Ohio St. 285, 164 N.E. 51, 63 A.L.R. 595, to the following effect:
>
> "'* * * in certain classes of cases collateral offenses may be shown as reflecting upon the mental processes or mental attitude of the accused, where intent or guilty knowledge is an essential element of the crime for which the defendant is on trial, or as throwing light upon the motive inducing

*Cited with approval by this Circuit on the issue of ability to commit the crime in United States v. Baker, 419 F.2d 83 (2d Cir. 1969), cert. denied, 397 U.S. 971 (1970).

> the commission of the crime, or to prove identity of the defendant, where identity is in issue, and more especially where such collateral offenses have been executed according to a plan or method, and it is shown that the accused persons committed such other offenses, and in so doing followed the same plan or method as is shown to have been followed in the commission of the crime charged in the indictment.'" (Emphasis supplied)

In the Whiteman case the evidence showed that the defendants had committed a series of robberies by impersonating uniformed police officers. They would drive their car next to that of a victim, force him to stop, and then rob him. Though the indictment before the court charged only one such offense, the evidence of the other similarly conducted robberies was held admissible as showing a design or plan, relevant to the issue of identity.

Defendant does not cite any federal cases in support of his position, but rather relies on several state court cases for his position. In fact, these cases support the view that a prior similar act establishing a common modus operandi is admissible to prove identity, viz, People v. Haston, 69 C.2d 233, 70 Cal. Rptr. 419, 444 P.2d 91 (1968). In Haston, the court said:

> When as in the instant case, a primary issue of fact is whether or not defendant rather than some other person was the perpetrator of the crime charged, evidence of other crimes is ordinarily admissible if it discloses a distinctive modus operandi common to both the other crimes and the charged crime.

* * *

> Several decisions have held that the test of admissibility of evidence of another offense offered to prove common design, plan, or modus operandi is whether there is some clear connection between that offense and the one charged so that it may be logically inferred that if defendant is guilty of one he must be guilty of the other. (People v. Cramer (1967) 67 Cal.2d 126, 129 [60 Cal. Rptr. 230, 429 P.2d 582].) It is apparent that the indicated inference does not arise, however, from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant. On the other hand, the inference need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together. Thus it may be said that the inference of identity arises when the marks common to the charged and uncharged offenses, consdiered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses.

Applying the foregoing law, and particularly the above quoted language of the Haston case, to the statement of facts relating to the New Hampshire prior similar act,

it is apparent that the New Hampshire prior similar act presents a near perfect fact situation for admissibility on the issue of identity of Brant in the Vermont offense.

In summary, the marks of identity in the New Hampshire robbery which were common to the Vermont robbery and which are listed in the preceding statement of facts with respect to the Vermont robbery, are as follows:

1. Brant used Government's Ex. 16, a sawed-off automatic single barrel shotgun in New Hampshire, and the same sawed-off automatic single barrel shotgun (Government's Ex. 16) was described as looking "exactly like the one used in the robbery on April 11th" (Tr. 499) The witness Goss stated that he noticed the similarity around the gun's chamber, the closeness of the end of the barrel and the chamber for the extra shells, and also the sighting bead.

2. Brant was identified as the take charge guy in New Hampshire who wielded the shotgun in the bank robbery, and who gave the time signal to the other robbers. A person wielding a shotgun, and similarly acting as the "take charge guy", who kept time, was also present at the Vermont robbery.

3. The .45 caliber automatic used in New Hampshire was described as similar to the weapon used in Vermont.

4. Baseball caps (Government's Ex. 3) worn in Vermont were described as very similar to the baseball hats worn in New Hampshire.

5. A translucent face mask (Government's Ex. 2) with an elastic band used in Vermont, was described as similar to the mask worn in New Hampshire.

6. The same type of vehicles (Ford LTDs) were stolen in New Hampshire and Vermont and the same procedure (use of a dent puller) was employed.

7. The four robbers involved in the New Hampshire robbery were initially in the Burlington, Vermont area.

It is submitted that the foregoing common features, when taken in combination, (in the language of Haston) "Logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses." 69 C.2d at 246. As Government counsel informed the court prior to its ruling on admissibility below, ". . . we think the inference the jury would draw through the witnesses from New Hampshire, who definitely pin Gardner and Brant together just before the robbery, that the

similarity of the acts over there is probative of the fact that the same people committed the acts in Vermont." (Tr. 112)

Accordingly, the Government submits that the testimony of prior similar acts in New Hampshire fully satisfies the test of admissibility under the Second Circuit cases as well as the District of Columbia Circuit's decision in Payne v. United States, and the decision of the California Supreme Court in Haston. In view of these clear precedents there can be no question but that the probativeness of the New Hampshire evidence in proving identity far outweighed any possible prejudice.

While the Government submits that the foregoing fully answers ARGUMENT I in defendant's brief, several ancillary questions are raised under Argument I, which are answered as follows:

A. Mention is made of the fact that the judge did not give requested cautionary instructions at the time that prior similar act testimony was received. (Def. Br., p. 1 and 7) Defendant's brief does not cite authorities in support of the proposition that this is necessary. Further, the Court indicated at the time that such requests were made that such cautionary instructions would be given in its charge to the jury. Thereafter, during its charge, the

Court did instruct the jury along proper lines, warning the jury that the New Hampshire evidence could not be considered as evidence bearing on the defendant's criminal character, but that the evidence could be used "to show a modus operandi, or pattern, or scheme of practically identical criminal acts, which pattern could then be considered by you like any other evidence in the case pertaining to the offense alleged in the indictment." (Tr. 728) Again, the defendant cites no authorities which indicate his proposed procedure should have been followed and is unable to show any prejudice from this approach.

B. Defendant contends that he was not given sufficient time to investigate or prepare a rebuttal to the New Hampshire evidence. (Def. Br. p. 2, 13) On page 13 of his brief, defendant states: "There was no opportunity for defense counsel to investigate the facts of the New Hampshire case so as to offer evidence or provide rebuttal witnesses." The Government, however, suggests that this is not an accurate picture of the situation. As noted in the above statement of facts, the record discloses that after the jury was empaneled the defense was alerted that prior similar act evidence would be offered. Further, the Court discussed the matter at length with counsel on the first

day of trial, and before testimony commenced on the second day of trial, 3500 material involving all New Hampshire witnesses was provided the defense, and well in advance of testimony by any New Hampshire witness. (Tr. 159) Additionally, on the second of trial, and prior to any New Hampshire evidence, the Government made available to defense counsel for inspection, "the entire F.B.I. reports that we have with respect to the Bank of New Hampshire robbery on October 4, 1973." (Tr. 160) Lastly, during the Government's case, and some three days after the defense had access to the complete F.B.I. files in the New Hampshire case, the Court recessed for 3 1/2 days, thereby giving the defense ample opportunity for investigation. (Tr. 555)

C. Defendant's brief objects at length to Gardner's inconsistent testimony regarding Bishop's participation in the "dry run" to rob the same branch bank of Chittenden Trust Company during December, 1973 (four months before the actual robbery). (Def. Br. p. 14 - 16). It is inferred that Gardner's testimony in toto should be rejected because of this inconsistency, although no authorities are cited. The Government contends that this line of objection is not worthy of consideration on appeal. Further,

the Court in its standard charge instructed the jury that it could disregard totally, if it desired, the testimony of any witness it believed had testified untruthfully. (Tr. 711-12) Gardner's credibility was solely a jury question under the long standing rule relating to credibility of witnesses. Stevens v. United States, 306 F.2d 834, 838 (5th Cir. 1962). It is obvious that the jury, as it properly could, either accepted Gardner's explanation of possible mistake, or it rejected only this part of Gardner's testimony relating to Bishop and accepted the balance of his testimony in all material respects.

D. Lastly, defendant's brief sets forth defendant's extensive cross-examination of F.B.I. Agent Riley of the Boston F.B.I. bank robbery squad, which cross-examination generally tended to show that stolen cars, removed ignitions, masks, disguises, sawed-off shotguns and other unidentified objects and procedures were common to many bank robberies. (Def. Br. p. 8-11)

After completing this examination, defendant moved that all evidence of the New Hampshire bank robbery be stricken because it was prejudicial and had no probative value.

It is pointed out that defendant's brief omits one very material point in Riley's testimony, namely, that Riley had never seen a sawed-off shotgun like Government's Ex. 16. (Tr. 536) Further, Riley's testimony regarding generalities had little application to the facts of the New Hampshire robbery where witnesses described guns, masks, caps and "take charge" procedures in substantial detail, and the same unique details were similarly described by Vermont witnesses as being present in the Vermont bank robbery. Accordingly, Riley's testimony on generalities had little probative value.

Based on the foregoing, the defendant is not entitled to claim reversible error for the major point and ancillary points argued under Argument I of defendant's brief.

POINT II

REFUSAL OF THE TRIAL JUDGE TO POLL THE JURY AFTER LEARNING OF PUBLICITY OF BRANT'S ATTEMPTED ESCAPE FROM CUSTODY WAS WITHIN THE TRIAL JUDGE'S DISCRETION AND NOT ERROR AS A MATTER OF LAW.

Appellant contends that the trial judge should have polled the jury to determine (1) whether any juror or jurors had heard of the publicized escape and (2) if so, "whether the prejudicial nature of the publicity did in fact influence one or more members of the jury." (Def. Br. p. 18)

Assuming arguendo that the trial judge was in error in not polling the jury, the newspaper article in question was not so prejudicial as to require the trial judge to empanel a new jury. United States v. Bentvena, 319 F.2d 916, 934 (2d Cir.), cert. denied sub nom. Pancio v. United States, 375 U.S. 940 (1963); United States v. Feldman, 299 F.2d 914, 917 (2d Cir.), cert. denied, 370 U.S. 910 (1962).

The trial judge in this case habitually and properly admonished the jurors at each recess of the trial that they should not discuss the case among themselves or with others or listen to anything or read anything about the case. (Def. App. 14, 36, 39, 48, 51, 52, 59) In

doing this, the Court was following generally the approach suggested by Judge Oakes in United States v. Palmieri, 456 F.2d 9, 14 n. 3 (2d Cir.), cert. denied sub nom Travisano v. United States, 406 U.S. 945 (1972).

Defendant places great emphasis on what he terms a substantial similarity between this case and United States ex rel Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973). The accused in Yeager claimed he had been denied due process in his bank robbery trial because the court failed to poll the jury after a local newspaper reported during trial that there had been an apparent breakout attempt by three prisoners, including the defendant. The article also disclosed the fact that Doggett had previously pleaded guilty and then changed his plea. The trial court questioned the jurors en banc after the article was published to determine if Doggett had been prejudiced by the article and four jurors indicated that they had heard about or read one of the articles during the trial, but the court then rejected a joint defense and prosecution suggestion and refused to inquire of the jurors whether there had been any discussion among themselves about the particular article. The trial court previously had admonished the jury members not to read anything about

the case but refused to question the jurors at a later point in the trial when Doggett's counsel reported to the court that he believed several members of the jury might have seen an article about the case in a newspaper lying on a counter in a luncheonette patronized by the jurors.

The Third Circuit reversed the District Court and held, inter alia, that the case of Marshall v. United States, 360 U.S. 310 (1959) was applicable to state criminal proceedings, and that actual prejudice to the defendant need not be shown. This principal of applicibility to state court proceedings, while not material to the instant case, was not followed by the Supreme Court in Murphy v. Florida, 95 S. Ct. 2031, 2035 (1975) and the doctrine that actual prejudice need not be shown has not been followed by the Third Circuit recently, as evidenced by United States v. D'Andrea, 495 F.2d 1170, 1172 (3d Cir.), cert. denied, 419 U.S. 855 (1974). The court in D'Andrea seemed to set aside the Yeager precedent, as noted from the following:

> In some cases the publicity that occurs is so fundamentally prejudicial that actual prejudice is presumed as a matter of law. In these cases, the mere occurrence of the event requires declaration of a mistrial. . . .

> Where the improper publicity is of a less serious nature, however, no similar presumption operates. In these cases, the appellate court (like the district court) must review the circumstances surrounding the exposure of the jury to the publicity and order a new trial only when substantial prejudice has occurred. See United States ex rel Doggett v. Yeager. . . . (Emphasis added)

Id. at 1172 n.5

Even in Yeager, there was a requirement that the material which might have reached the jury be seriously prejudicial. 472 F.2d at 239.

Further, the Supreme Court in Murphy v. Florida laid to rest any contention that a juror who had been exposed to information about a defendant's prior convictions or to news accounts of the crime with which he is charged, presumptively deprives a defendant of due process. 95 S. Ct. at 2036.

Defendant relies on United States v. Hankish, 502 F.2d 71 (4th Cir. 1974) as standing for the proposition that a new trial is needed because of the possibility that the jury's verdict may have been influenced by the prejudicial newspaper article. This is an overly simplistic view of this case. The facts in Hankish reveal that on the second day of trial an article appeared in a local

newspaper summarizing some of the first day's testimony. Additionally the article described Hankish as a "wheeling rackets figure" and gave other information that could give a jury the impression that Hankish was a racketeer, director of a multistate theft ring and that defendant Matthews was a participant. The holding in Hankish suggests that this information was highly prejudicial, but in fact other language from Hankish applies here:

> We do not hold that every newspaper article appearing during trial requires such protective measures. Unless there is substantial reason to fear prejudice the trial judge may decline to question the jurors.

Id. at 77. See United States v. Edwards, 366 F.2d 853, 873 (2d Cir. 1966), cert. denied, 386 U.S. 919 (1967).

United States v. Armocida, 515 F.2d 29 (3d Cir. 1975) is based upon facts similar to the instant case. In Armocida, a Beaver County, Pennsylvania newspaper carried an account of a suppression hearing which had been held outside the presence of the jury at the beginning of the sixth week of trial. The defendants moved to poll the jury, but the trial judge, after reading the two published articles, denied the motion on the grounds that (1) none of the jurors resided in Beaver County, (2) after a prior

incident involving newspaper reports, the jury had been instructed not to read newspaper accounts, and (3) the court feared that to poll the jury would call attention to the articles, thereby emphasizing their content. The court of appeals sustained the district court's exercise of its discretion, although in doing so it did indicate that it believed it to be a better practice to poll the jury and ascertain if any of the jurors had read the newspaper accounts. Id. at 49. The court stated:

> The publicity here was not so fundamentally prejudicial as to result in actual prejudice occurring as a matter of law. . . Even assuming arguendo, that one or more jurors had read the articles, large discretion would remain in the trial judge in ruling on the issue of prejudice. A new trial should be ordered only when substantial prejudice has occurred. (Citing inter alia, Yeager).

Id. at 49. The court further stated that since substantial prejudice to the appellants could not have resulted from the articles themselves that it would refrain from finding reversible error based upon the mere speculation of prejudice. Id. at 49.

The publicity to which the jurors might have been exposed did not deal with the appellant's guilt but at most involved background information. See Sheppard v.

Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); United States v. Manfredi, 488 F.2d 588, 604 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974); United States v. Persico, 425 F.2d 1375, 1380 (2d Cir.), cert. denied, 400 U.S. 869 (1970); United States v. Edwards, supra; United States ex rel Gallo v. New York State Dept. of Correctional Serv., 335 F. Supp. 915, 918 (S.D.N.Y. 1972). Certainly news of an attempted escape would not have been relevant to appellant's guilt or innocence in the instance case, even if known by every juror.

The Government's position here basically is that the newspaper article did not deal with the guilt or innocence of the defendant; that the article was not so fundamentally prejudicial (if prejudicial at all) as to result in actual prejudice as a matter of law; that the Court would have emphasized the article had it inquired of the jurors concerning it, thus prejudicing the defendant and that the decision of the Court not to poll the jury was well within its discretion. This latter point is particularly well taken when the Court realizes that the judge was in a better position to evaluate any possible prejudice in the context of the trial than an appellate court on the cold record months after the incident occurred.

POINT III

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

Under Point III of his brief, defendant argues that the trial court erred in not polling the jury after trial, or granting a new trial because of alleged prejudicial effects of a newspaper article published and in general circulation for the last day of trial. Specifically, the thirteenth paragraph of the story, which appeared on page 19 of the Burlington Free Press, on May 28, 1975, the same morning on which the jury was given the case for its deliberation, read as follows:

> Brant has been indicted on charges of murdering two persons whose bodies were found in a swamp in Ledyard, Conn. according to the Associated Press. He attempted to escape from the Burlington Community Correctional Center Sunday night after overpowering a guard and taking his keys. After several minutes of liberty, however, he was recaptured by police at College Street and South Winooski Avenue.

The contents of this article was not brought to the court's attention on the morning of publication, which was the last day of trial, but was first presented in defendant's motion to dismiss filed several days after trial.

The Government has already briefed its position, under Argument II, above, on the last two sentences of the article which relate to Brant's attempted escape. Similarly, the same position is equally applicable to so much of the article which relates to the indictment for homicide. In addition to Point II arguments, supra, it is pointed out that the article in no way dealt with the guilt or innocence of Brant.

Lastly, if the article was seen by any juror during the hour or two that it was in general circulation prior to the jury receiving the case on the morning of May 28, it was seen in light of the court's following precise admonition given to the jury at 4:55 P.M. the preceding evening, viz:

> THE COURT. Ladies and Gentlemen, you heard the arguments of counsel; you have heard all of the testimony in the case. The evidence has been presented. When you retire for your deliberations, your judgment and your opinion has to be based on the evidence and the testimony in the case, and only on that evidence, and only on that testimony. We are going to suspend now for the evening, and we are going to resume tomorrow morning at 9:30. At that time, I will give you the charge, but it is very important and more important than it has been up to this point--and I want to stress this--that you do not read anything about the case, or discuss it with anybody,

> or hear anything about it, or listen to it. It is very critical, partly because of the time of the day, and how much you have heard to date. So once again I want to stress that and tonight just don't discuss it and in the morning don't read anything about it, and at 9:30 we'll give you the charge, so we will stand in recess until that time. (Tr. 697-98)

Accordingly, for the reason set forth under Point II above, and in light of the foregoing admonition, it was not error for the court to deny defendant's motion for a new trial based on any claimed prejudicial effect flowing from the May 28, 1975 newspaper article.

## CONCLUSION

The conviction of Donald Richard Brant on Counts I and II should be affirmed.

Respectfully submitted,

GEORGE W. F. COOK
United States Attorney for
the District of Vermont,
Attorney for the United
States of America

December 24, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Docket No. 75-1382 |
| | ) | |
| DONALD RICHARD BRANT | ) | |

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of December, 1975 mailed two copies of the Government's Brief in the above-captioned case to Alden T. Bryan, Esq., counsel for the defendant.

George W.F. Cook
United States Attorney